by a quantity surveyor. Having regard to all the circumstances and on the authority of *Re a Company*,[4] all the more so I did not see how one could say that the company clearly knew that the sum due to the petitioners was $58,626.29 and that since they did not pay that sum, there was neglect to pay within s 254(a) of the Companies Act.

For the above reasons, I did not think, in the light of the dispute between the parties on the sum claimed by Boustead, that a filing of a winding-up petition was a proper course to pursue. An action should have been instituted to establish the amount due from the company to Boustead. Accordingly, I dismissed this substituted petition and fixed costs at $2,500.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw*; *Tan, Lee & Choo.*

Reported by *Terence Tan Bian Chye*

The Brightside Mechanical and Electrical Services Group Ltd & Anor v Standard Chartered Bank & Anor

HIGH COURT (SINGAPORE) – MOTION IN SUIT NO 373 OF 1988
CHAN SEK KEONG J
26 APRIL 1989

Banking – Performance bond – Whether performance guarantee required – Guarantee extended under protest – Whether guarantee invalidated on the ground of mistake, duress or lack of consideration – Allegation that demand for payment was fraudulent – Standard of proof for fraud – Demand to comply with terms of guarantee – Requirement for beneficiary to determine that there was a breach of contract – Beneficiary's demand referring to belief – Whether 'belief' equivalent to 'determination'

Civil Procedure – Interlocutory injunction – Balance of convenience – Whether mere hardship to plaintiff sufficient to warrant injunction

Contract – Building contract – Contract requiring performance guarantee – Whether guarantee had to be provided during defects liability period

The second defendants were the main contractors of a development. Another company was subcontractor for part of the development. This company had a duty to provide a performance bond which they did through the first defendants in the form of a bankers' guarantee. Later, the first plaintiffs replaced this company as subcontractors. A new performance guarantee was issued by the first defendants in favour of the second defendants. After its initial expiry, the guarantee was extended for ten further periods of varying durations. The first five extensions were made without dispute between the parties. When the second defendants requested the sixth extension, the first plaintiffs objected on the ground that the subcontract works for which they were responsible would have been substantially completed by the end of the fifth extension. The second defendants were of the view that the first plaintiffs had contractual obligations to perform even after the date of practical completion, namely, a duty to remedy defects during the defects liability period. After the second defendants threatened legal action, the second defendants extended the guarantee. Further extensions were later made. Finally, when an eleventh extension was requested, the first plaintiffs took a firm stand and refused to do so. The second defendants made a demand on the first defendants for payment under the performance guarantee. The first plaintiffs rejected this and started the present proceedings and claimed against the second defendants, inter alia, a declaration that the first plaintiffs were under no obligation to provide extensions of the performance guarantees and a declaration that any demand made by the second defendants on the first defendants on the ground of the first plaintiffs' failure to extend the guarantee was unjustified. The first plaintiffs obtained, on the same day, an ex parte injunction restraining the first defendants from paying the second defendants under the demand and debiting the first plaintiffs' account. Later, the first plaintiffs added the second defendants as a party to the proceeding. Their statement of claim was also amended to include a claim against the second defendants for a declaration that the last extension of the performance guarantee was void and the demand of the first defendants was not valid and injunctive relief. The first plaintiffs made a motion for two applications, namely, to continue the interim injunction until the trial of the action, and to restrain the first defendants from paying the sum demanded from the second defendants under the performance guarantee. The first plaintiffs argued that their obligation to provide the performance guarantee ceased before the last extension, and that the last extension was void as it was procured under duress or under a mistake or procured without consideration. It was also claimed that the demand made by the second defendants was void because the extension of the guarantee itself was void, and the demand itself was fraudulent.

Held, dismissing the applications:

(1) On a construction of the words of the subcontract, it would appear that the performance guarantee only had to be provided up to the completion of the subcontract works and not during the defects liability period. If the parties wanted to cover this latter period, a reduction in the amount of the security to be provided would be expected. There was some doubt therefore as to the extent of the plaintiffs' obligations to provide the performance guarantee.

(2) In view of the court's findings on the balance of convenience, it was unnecessary to decide whether the first plaintiffs' claim that the last extension was void had a real prospect of succeeding at the trial.

(3) If the plaintiffs' submissions on the construction of the contract provisions was correct, their next argument was that the eleventh extension was null and void. Assuming that this was a triable issue, the plaintiffs still have to persuade the court that they would suffer irreparable harm if the interlocutory injunction was not granted.

(4) The first plaintiffs have not produced sufficient evidence to persuade the court that the second defendants would not be in a position to repay the sum in dispute if the first plaintiffs were to succeed at the trial. The first plaintiffs' plea is one of hardship and injustice. But on the authorities, the test is not mere hardship to the first plaintiffs but irreparable harm to them.

(5) The first plaintiffs have submitted that they would encounter difficulty in claiming the return of the security as the second defendants are a South Korean company subject to a system of law which is totally different from the local system. The plaintiffs cannot now complain about this fact as the performance guarantee itself has specifically provided that any sum payable thereunder would be paid to the second defendants' account at such bank in the Republic of Korea as the second defendants might stipulate. The balance of convenience therefore lay in favour of the second defendants.

(6) The standard of proof of fraud sufficient to obtain an injunction against payment on the performance guarantee was discussed in various cases. The law was that the evidence of fraud must be clear, both as to the fact of fraud and as to the bank's knowledge. The court would require strong corroborative evidence of the allegation, usually in the form of contemporary documents. The other party should have been given an opportunity to answer the allegation and to have failed to provide any or any adequate answer where, in the circumstances, one could properly be expected.

(7) The plaintiffs have failed to show that it is seriously arguable that fraud has occurred. The fact that the second defendants have repeatedly demanded the extensions of the performance guarantee could not be evidence of fraud. The lawful pursuit of what one believes to be one's rights cannot be fraudulent.

(8) It was not necessary for the first plaintiffs to obtain an injunction to stop payment on the guarantee as, if the second defendants had paid wrongly, they would not be entitled to debit the account of the first plaintiffs with the amount paid. However, since extensive arguments were made by counsel, the question as to whether there was a serious issue as to the validity of the second defendants' demand would be discussed.

(9) Because of the autonomous nature of performance guarantees, the beneficiary, under an unconditional performance guarantee is entitled to payment on demand without having to prove a breach of the underlying contract by the other party. However, in documentary credits, all conditions must be strictly complied with.

(10) The words 'belief' and 'determination' were conceptually different, and they perform different functions. The word 'belief' expresses a state of mind, whereas the word 'determination' expresses a conscious act of deciding that something is the case.

(11) A belief was therefore not a determination. Since the second defendants did not in their demand notice indicate that they had made a determination (as required by the performance guarantee) but merely had a belief, the demand notice did not comply with the requirements of the performance guarantee.

(12) Based on the reasons above, although the plaintiffs had raised an arguable issue on the validity of the second defendants' demand notice, they are not entitled to a continuation of the ex parte interlocutory injunction obtained against the first defendants or a fresh injunction against the second defendants.

[*Editorial Note*: The plaintiffs have appealed to the Court of Appeal vide Civil Appeal No 34 of 1989.]

Cases referred to

1 *United Trading* v *Allied Arab Bank* [1985] 2 Lloyd's Rep 554 (folld)

2 *Esal (Commodities) Ltd* v *Oriental Credit* [1985] 2 Lloyd's Rep 546 (folld)

3 *Selvas Pty Ltd* v *Hansen & Yuncken (SA) Pty Ltd* [1987] (unreported) (refd)

4 *Pearson Bridge (NSW) Pty Ltd* v *The State Rail Authority of NSW* [1982] 4 ACLR 81 (refd)

Giam Chin Toon for the plaintiffs.
David Lim for the first defendants.
Naresh Mahtani for the second defendants.

Cur Adv Vult

Chan Sek Keong J: There are two applications before me, both made by the plaintiffs. The first is for an order to continue until the trial of this action an interim injunction made ex parte on 26 February 1988 to restrain the first defendants from paying the sum of $5,342,828 as demanded by the second defendants under a performance guarantee dated 13 August 1985 which was successively extended to expire on 26 February 1988. The second application is to restrain the second defendants from doing anything to obtain (or as intended, to receive) payment of the said sum of $5,342,828 from the first defendants.

Background

The factual background is as follows. The second defendants were the main contractors of the development known as the Marina Centre Project. A part of the main contract works, ie for mechanical works consisting of (a) air-conditioning and ventilation and (b) plumbing and fire protection (hereinafter called 'the subcontract works'), was awarded to Carl P Wallace International Inc ('CPWI') at the respective tender prices of $46,447,607 and $60,765,413, making a total of $106,856,553. The terms and conditions of the subcontract works are contained in the following documents which collectively I shall refer to as the subcontract:

(a) form of tender (FT1-4);
(b) conditions of tender (CT1-8);
(c) conditions of subcontract (CSC1-28); with an addendum and drawing description;
(d) preambles (P1-51);
(e) appendices.

Under the terms of the subcontract, CPWI agreed to complete the subcontract works commencing from 17 September 1982 up to 23 March 1985 in accordance with a construction programme to be agreed with the second defendants (CSC-26), subject to authorized extensions (para G in P/24). The period for completion included Sundays, public holidays and rest days, but not the defects liability period (see FT2) which was 12 months from the date of practical completion of the main contract works. Paragraph C of preamble P8 defined the scope of the subcontract works to include maintenance work during the defects liability period.

CPWI had to provide a performance bond in accordance with para D of preamble P13, which they did through the first defendants in the form of a bankers' guarantee. The first validity period of the guarantee was from 24 November 1982 to 23 March 1985 covering the period for completion of the subcontract works; it was subsequently extended for the following periods: 24 March 1985 to 10 July 1985; 11 July 1985 to 24 July 1985; 25 July 1985 to 7 August 1985 and 8 August 1985 to 17 August 1985.

On 15 July 1985, the first plaintiffs replaced CPWI as the subcontractors and on 13 August 1985, a new performance guarantee was issued by the first defendants in favour of the second defendants. The material parts of this guarantee are as follows:

> ... we The Chartered Bank, Singapore, ('the guarantor'), hereby irrevocably and unconditionally guarantee the payment to you of S$5,342,828.00 being five percent of the value of the subcontract (S$106,856,553.00) and accordingly convenant and guarantee as follows:
>
> (1) *On the subcontractor's failure to fulfil any of the conditions of the subcontract as determined by you in your absolute judgment* the guarantor shall forthwith on *demand* made by you in writing and not withstanding any objection by the subcontractor pay you such amount or amounts as you shall require not exceeding in aggregate the abovementioned amount of S$5,342,828.00 by transfer through the Korea Exchange Bank to an account in your name at such bank in the Republic of Korea as you shall stipulate or in such other manner as shall be acceptable to you. (Emphasis added)
> (2) (Not applicable).
> (3) (Not applicable).
> (4) This guarantee shall remain valid and in full force and effect up to the end of 28 February 1986 provided that any claim hereunder must be received by us in writing on or before 28 February 1986 after which date our liability ceases.
> (5) (Not applicable).

The validity periods of this guarantee and of the subsequent extensions were as follows: (1) 13 August 1985 to 28 February 1986, (2) 1 March 1986 to 30 June 1986, (3)1 July 1986 to 30 October 1986, (4)1 November 1986 to 31 December 1986, (5) 1 January 1987 to 28 February 1987, (6) 1 March 1987 to 3 April 1987, (7) 4 April 1987 to 3 May 1987, (8) 4 May 1987 to 31 August 1987, (9) 1 September 1987 to 2 October 1987, (10) 3 October 1987 to 3 November 1987, (11) 4 November 1987 to 26 February 1988.

Up until the fifth extension the parties were ad idem. However, when the second defendants requested the sixth extension the first plaintiffs objected on the ground that the subcontract works would have been substantially completed by February 1987.

The second defendants did not accept the first plaintiffs' objection as they were of the view that the first plaintiffs had contractual obligations to perform even after the date of practical completion, ie during the defects liability period. The first plaintiffs, on the other hand, maintained that their obligation to provide the performance guarantee would cease upon practical completion of the subcontract works. The first plaintiffs on 20 February 1987 offered to extend, without prejudice to their legal position, the performance guarantee to 25 February 1987 for a reduced amount. The second defendants rejected the offer on the same day and threatened action (which was not specified) if the guarantee were not extended by 25 February 1987. The first plaintiffs capitulated and procured the sixth extension. The seventh, eighth and ninth extensions were, at the request of the second defendants, subsequently procured by the first plaintiffs apparently without any protests or reservations of their legal rights.

On 30 September 1987, the architect issued the certificate of practical completion in respect of the main contract works. The said certificate reads as follows:

> In accordance with the conditions of contract, I certify that subject to the making good of outstanding items notified to you under cll 6(4) and 15(3) of the conditions of contract and under notices of non-compliance and snag lists issued pursuant to the conditions of contract and of any apparent defects shrinkages and other faults which appear during the defects liability period, the works were in my opinion practically completed to my satisfaction in accordance with the conditions of contract on 30 September 1987.

On 17 September 1987, the second defendants requested that the guarantee be extended to 2 October 1987. The first plaintiffs again procured a tenth extension. There is no evidence of any overt threat being made in respect of this extension nor did the first plaintiffs protest against the request. On 17 October 1987, the second defendants requested another extension of the performance guarantee 'up to the end of the defects liability period such as is provided for the subcontract'. The first plaintiffs requested twice for a meeting to discuss this request, whereupon the second defendants on 22 October 1987 responded by making a demand for payment, the relevant portions of the demand were as follows:

> Pursuant to the provisions of the subcontract, WBE are contractually obliged to provide a performance bond for 'the duration of their subcontract' which includes the defects liability period which will not expire until 29 September 1988.
>
> We have recently received an indication from WBE that they do not consider that they are obliged to provide a further extension of the letter of guarantee, *and we consider that to be a risk that WBE will allow the letter of guarantee to expire on 3 November 1987, thus breaching a condition and being in default of the subcontract.* (Emphasis added) In these circumstances we hereby demand payment of the sum of S$5,342,828 pursuant to the terms of the letter of guarantee. Please however take notice that if the letter of guarantee is extended to 29 September 1988 and satisfactory proof of such an extension is provided by you before 1500 hours on 3

November 1987 the demand for payment contained herein will be withdrawn.

If such an extension is not provided we require you to effect payment by bank draft of the sum of S$5,342,828 to the Korea Exchange Bank, Singapore Branch, Account No 00642 in favour of Hyundai Engineering & Construction Co Ltd.

The first plaintiffs protested against this demand but again capitulated and thus the eleventh extension was procured. In response, the second defendants on 23 November 1987 formally withdrew their demand but reserved the right to call for a further extension. On 10 February 1988, the second defendants again requested an extension of the performance guarantee up to 29 September 1988. This time, however, the first plaintiffs decide to stand firm on the issue. In their letter dated 23 February 1988 to the second defendants, the first plaintiffs asserted that the effective date of practical completion of the subcontract works was on 26 February 1987 as on that day the owners had 'beneficial occupation of the buildings' and that was the reason for the eleventh extension. The second defendants disagreed, maintaining that the performance guarantee must cover the defects liability period commencing from the date of issue of the certificate of practical completion, ie up to 30 September 1988.

On 26 February 1988, the second defendants once again made a demand on the first defendants for payment of $5,342,828 under the performance guarantee. The first plaintiffs rejected this demand and commenced the present proceedings and claimed against the second defendants, inter alia,

(a) a declaration that the first plaintiffs were under no obligation to provide a performance guarantee beyond 26 February 1987 or 30 September 1987, and
(b) a declaration that any demand made by the second defendants on the first defendants on the ground of the first plaintiffs' failure to extend the guarantee was unjustified and invalid in law.

The first plaintiffs on the same day obtained an ex parte injunction restraining the first defendants from paying the second defendants under the demand and from debiting their account. On 8 March 1988, the first plaintiffs added the second defendants as a party to the proceedings and also amended the statement of claim to an indorsement of claim. As amended, the first plaintiffs claimed against the second defendants, inter alia, a declaration that the performance guarantee to the extent that it was extended beyond 3 November 1987 (viz the eleventh extension) was void and that the demand dated 22 October 1987 was not a valid demand and for injunctive relief.

Numerous affidavits have been filed on behalf of the first plaintiffs and the second defendants in relation to the application before me. These affidavits contain a number of matters of disagreement between the first plaintiffs and the second defendants, eg the extension of time granted by the employers; the first plaintiffs' right to payment of the certified sum of $2,653,284; the value of the additional works allegedly done by the first plaintiffs for which the balance of about $117m is alleged payable; the amount of liquidated damages claimed by the employers against the second defendants and whether the first plaintiffs were liable for these damages; the liquidated damages that might be payable by the first plaintiffs for delay (allegedly for more than 812 days from 10 July 1985 to 30 September 1987 at the rate of $200,000 per day) etc.

These disputes are irrelevant to the issues in the present applications but it needs to be observed that in the state of the evidence before me the allegation by the second defendants that they were entitled to claim $162,480,000 (ie $200,000 x 812) as liquidated damages from the first plaintiffs would appear to be grossly exaggerated and was in fact made in an affidavit in answer to the first plaintiffs' disclosure that they had made a claim for $117,238,116 for the balance of works done by them. This disclosure together with the non-payment of the certified payment has put the second defendants in a very poor light as it tended to show that their demand under the performance guarantee could be particularly unreasonable and unfair. This observation puts into perspective the reason for the present proceedings against the second defendants and the first plaintiffs' allegation of fraudulent conduct against them.

Issues of law

I turn now to the issues of law. The first plaintiffs' case is as follows:

(a) their obligation to provide a performance guarantee ceased on 30 September 1987 or 30 November 1987 at the latest;
(b) the eleventh extension was null and void as it was procured (i) without any consideration, or (ii) under a mistake or (iii) under duress;
(c) the demand made on 26 February 1988 under the eleventh extension was bad because (i) the said extension was null and avoid by reason of (b) and, (ii) in any event, did not comply with the terms of the guarantee and was fraudulently made.

The second defendants join issue with the first plaintiffs on all these points, which I now consider.

Scope of performance guarantee

The form of tender (FT2) provides for completion of the subcontract works before 23 March 1985 (the initial projected completion date of the main contract works) and that the time of completion shall not include the

defects liability period. Part II of the appendix to the conditions of subcontract (at p 26) also describes the completion of the whole of the subcontract works to be in accordance with the main contract completion of 23 March 1985. The emphasis appears to be on the first plaintiffs' obligation to complete the subcontract works rather than their obligation to maintain such completed works during the defects liability period.

Paragraphs C (P8) and D (P13) of the preamble read as follows:

> C Scope of subcontract works
> *The subcontract works shall* be as shown on the subcontract drawings and described in the subcontract documents and *include* the manufacture, supply, testing, packing for transport, delivery to site, unloading, installation, connections, final testing and commissioning, handing over in an approved working order and *maintenance thereafter* for the defects liability period of 12 months. (Emphasis added)
>
> D performance bond
> The subcontractor shall at his own expense provide a performance bond, a specimen of which is attached in the appendix. The bond shall be with a bank approved by the contractor and *shall be renewed if subcontract completion is delayed*. If any delay is beyond the control of the contractor, the subcontractor shall bear the cost of any additional charges in respect of such renewal. (Emphasis added)

It is to be noted that under para C, the scope, and therefore the duration, of the subcontract works includes the defects liability period but that under para D the scope of the performance bond and therefore its duration is qualified by its reference to the completion of the said works. The word 'completion', as I have earlier mentioned, is not appropriate to refer to maintenance works during the defects liability period. The words 'if the subcontract completion is delayed' in para D could also appear to suggest that the performance guarantee relates to the completion of the subcontract works and not maintenance during the defects liability period.

This issue, as to the first plaintiffs' contractual obligations, is not frivolous when translated into monetary terms. There is an obvious quantitative difference between the completion of the subcontract works up to the stage of practical completion and the maintenance of such works. Here the initial value of the subcontract works was about $106m and whilst the requirement of a performance guarantee of 5% of that value may be reasonable for the *completion* of the said works, it is arguable that the requirement for the same amount of security for the maintenance of the same works after practical completion would appear wholly excessive and therefore unreasonable. The second defendant is, of course, contending that the 5% security is to secure the *completion and maintenance* of the works, and therefore the amount is reasonable. Against that it may be said that if that were so, one would have expected the parties to have provided for a reduction in the amount of the security to be provided after practical completion.

Much reliance has been placed by counsel for the first plaintiffs on the fact that each of the extensions of the guarantee until the sixth extension were made specifically to cover the completion period of the subcontract and that it was only when practical completion was due that the second defendants demanded a guarantee to cover the defects liability period. The apparent delay of the second defendants may or may not be explicable in terms of their understanding of their rights. It might be that the duration of the performance guarantee did not tax their mind until practical completion was due. But the reason for the late demand is one of the matters which can only be determinable at the trial of the action.

For these reasons, I am of the view that the extent of the plaintiffs' obligations to provide the performance guarantee is a matter of some doubt.

The next stage in the first plaintiffs' submissions is that if their construction of the contract provisions is correct, the eleventh extension was null and void on the ground of (1) lack of consideration; (2) mutual mistake and (3) economic duress. In view of my finding on the balance of convenience, I do not wish to decide whether the first plaintiffs have a real prospect of succeeding on these issues at the trial of this action. Assuming, however, that these are triable issues, the first plaintiffs have still to persuade the court that they will suffer irreparable harm if the interlocutory injunction is not granted. Here, the injunction is to restrain the payment by the first defendants to the second defendants of $5,342,828 being 5% of the performance guarantee. The first plaintiffs have not produced sufficient evidence to persuade me that the second defendant would not be in a position to repay the said sum if the first plaintiffs were to succeed at the trial. The second defendants have, on the other hand, produced evidence that they have a large contract relating to the contruction of the second passenger terminal building at Changi International Airport. The first plaintiffs' plea is one of hardship and injustice, ie they have a claim for more than $119m against the second defendants for which they have not been paid and yet they are being required to pay another $5m to the second defendants. But, on the authorities, the test is not mere hardship to the first plaintiffs but irreparable harm to them. The justice of the matter is, of course, a matter on which the second defendants may legitimately take issue with the first plaintiffs. After all, if the first plaintiffs, as subcontractors, are entitled to and have not been paid $119m, the second defendants, as the main contractors, are also entitled to and have not been paid at least that amount by the employers. The $5m is payable as a security for maintenance works required during the defects liability period for which the first plaintiffs may or may not be

liable. That has to be established in due course. This sum is refundable if the first plaintiffs succeed in their case, ie the security is not payable at all. It or part of it is also refundable even if they do not succeed if no maintenance works are required. The first plaintiffs have submitted, in that event, that they would encounter difficulty in claiming the return of the security as the second defendants are a South Korean company subject to a system of law which is totally different from ours. I do not think the first plaintiffs can now complain about this fact as the performance guarantee itself has specifically provided that any sum payable thereunder would be paid to the second defendants' account at such bank in the Republic of Korea as the second defendants might stipulate. It is for this reason, ie the balance of convenience lies in favour of the second defendants in any event that I eschew from embarking on an examination of the issues of lack of consideration, mutual mistake and economic duress.

Of course, the same position obtains between the first plaintiffs and the second defendants in regard to the second main allegation of non-conformity of the demand notice and fraud. Similarly, as between the first plaintiffs and the second plaintiffs, the balance of convenience also lies with the second plaintiffs. The legal position between the bank (the guarantor) and the account party (the customer) in a situation where the account party seeks to restrain the bank from paying on its guarantee, whether on the ground of fraud or otherwise, is set out with great clarity by Ackner LJ (as he then was) in *United Trading* v *Allied Arab Bank*[1] at p 565 where his Lordship said:

> In *Harbottle Ltd* v *The National Westminster Bank* [1978] QB 146, at p 155 Mr Justice Kerr said:
>
> > The plaintiffs then still face what seems to me to be an insuperable difficulty. They are seeking to prevent the bank from paying and debiting their account. It must then follow that if the bank pays and debits the plaintiffs' account, it is either entitled to do so or not entitled to do so. To do so would either be in accordance with the bank's contract with the plaintiffs or a breach of it. If it is in accordance with the contract, then the plaintiffs have no cause of action against the bank and, as it seems to me, no possible basis for an injunction against it. Alternatively, if the threatened payment is in breach of contract, which the plaintiffs' writs do not even allege and as to which they claim no declaratory relief, then the plaintiffs would have good claims for damages against the bank. In that event the injunctions would be inappropriate, because they interfere with the bank's obligations to the Egyptian banks, because they might cause greater damage to the bank than the plaintiffs could pay on their undertaking as to damages, and because the plaintiffs would then have an adequate remedy in damages. The balance of convenience would in that event be hopelessly weighted against the plaintiffs.
>
> The above observations seem particularly apposite to this case. If Rafidain meets Agromark's demand and calls upon the next bank in the chain to meet its guarantee, ultimately the plaintiffs will be debited by their own bank with the sum paid out, together with the appropriate charges. The bank will not be paying out this sum from the plaintiffs' account, because there is no such, or any significant, sum in the account. The plaintiffs' bank will be debiting the plaintiffs with the sum involved. Such debit is either a valid or an invalid debit. Mr Yorke, however, submits, with some force, that his clients, given a debit in its bank account of several million US dollars, will be unable to raise further credit with that bank or with any other bank. However, even given the injunctions they seek, they are bound to experience difficulties in raising further sums from their own bank or from other banks to whom they would have to disclose their potential liabilities arising from the performance bonds issued on their instructions.

The whole thrust of the first plaintiffs' case is that the second defendants' demand for payment is bad and, it follows, any payment by the first defendants is equally bad on two grounds: (1) non-compliance with the terms of the guarantee and (2) fraud. I will take the allegation of fraud first. The standard of proof for fraud was discussed by Ackner LJ (at p 560) in *Allied Arab Bank*[1] in the following words:

> The respondent banks accept for the purposes of this appeal that the fraud exception exists. They point out, however, that it has never been successfully invoked in practice because of the heavy burden of proof. They contend that this is because proof of facts which, in the absence of explanation, would ordinarily establish fraud is not sufficient unless every possibility of an innocent explanation is excluded. They submit that the courts will accordingly speculate whether an innocent explanation is possible, and will usually not infer fraud from mere silence in the face of accusation.
>
> In our judgment the respondents are overstating the standard of proof. The evidence of fraud must be clear, both as to the fact of fraud and as to the bank's knowledge. The mere assertion or allegation of fraud would not be sufficient (see *Bolivinter Oil SA* v *Chase Manhattan Bank NA* [1984] 1 Lloyd's Rep 251 per Sir John Donaldson MR at p 257). We would expect the court to require strong corroborative evidence of the allegation, usually in the form of contemporary documents, particularly those emanating from the buyer. In general, for the evidence of fraud to be clear, we would also expect the buyer to have been given an opportunity to answer the allegation and to have failed to provide any, or any adequate answer in circumstances where one could properly be expected. If the court considers that on the material before it the only realistic inference to draw is that of fraud, then the seller would have made out a sufficient case of fraud.
>
> While accepting that letters of credit and performance bonds are part of the essential machinery of international commerce (and to delay payment under such documents strikes not only at the proper working of international commerce but also at the reputation and standing of the international banking community), the strength of this proposition can be over-emphasized. As Mr Justice Neill observed in the judgment under appeal, it cannot be in the interests of international commerce or of the banking community as a whole that this important machinery that is provided for traders should be misused for the purpose of fraud. It is interesting to observe that in America, where concern to avoid irreparable damage to international commerce is hardly likely to be

lacking, interlocutory relief appears to be more easily obtainable. A temporary restraining order is made essentially on the basis of suspicion of fraud, followed some months later by a further hearing, during which time the applicant has an opportunity of adding to the material which he first put before the court. Moreover, their conception of fraud is far wider than ours and would appear to include ordinary breach of contract. (See *Dynamics Corporation of America* v *The Citizens and Southern National Bank* 356 F Supp 991 (1973); *Harris Corporation* v *NIRT* F 2d 1344 (1982); and *Itek Corporation* v *FN Bank of Boston* 566 F Supp 1210 (1983)). These cases appear to indicate that, for the purpose of obtaining relief in such cases, it is not necessary for an American plaintiff to demonstrate a cause of action against a bank, whereas it is, as previously stated, common ground that a plaintiff must in this country show a cause of action. There is no suggestion that this more liberal approach has resulted in commercial dislocation which has, by implication at least, been suggested would result from rejecting the respondent's submissions as to the standard of proof required from the plaintiffs. Moreover, we would find it an unsatisfactory position if, having established an important exception to what had previously been thought an absolute rule, the courts in practice were to adopt so restrictive an approach to the evidence required as to prevent themselves from intervening. Were this to be the case, impressive and high-sounding phrases such as 'fraud unravels all' would become meaningless.

On the materials before it, the first plaintiffs have failed to show that it is seriously arguable that fraud has occurred. The fact that the second defendants have repeatedly demanded that the performance guarantee be extended to cover the defects liability period could not be evidence of fraud. They were perfectly entitled to take the view that that was what the subcontract required of the first plaintiffs just as the first plaintiffs were perfectly entitled to take the opposite view. The lawful pursuit of what one believes to be one's rights cannot be fraudulent.

As regards the second allegation, ie the demand notice did not comply with the requirements of a valid notice, the legal position is as stated in the long passage I have quoted from Ackner LJ's judgment in *Allied Arab Bank*.[1] If the first plaintiffs have an arguable case on this issue, it would of course be prudent for the first defendants not to pay the second defendants. This case is no different from that of a beneficiary presenting a set of non-conforming documents under a letter of credit. The first defendants pay at their own risk. Upon payment, they will, no doubt, either require the customer to reimburse them or they may debit the account of such customer. But, as Ackner LJ has said, the debit is either valid or invalid. If it is valid, the customer is not entitled to an injunction. If it is invalid, he does not need an injunction. He simply refuses to reimburse the bank or recognise the validity of the debit. The first plaintiffs are in this position vis-à-vis the first defendants. For this reason, it is not really necessary for me to decide in these proceedings whether there is a serious issue as to the validity of the second defendants' demand. That issue will only arise when the first defendants have paid the second defendants and taken steps to recover such payment from the first plaintiffs. However, since extensive arguments have been made by counsel on the issue, I will deal with it.

The second defendants' demand notice was as follows:

> Letter of Guarantee No 957/85/916 dated 13 August 1985 for S$5,342,828 – Wallace Brightside Engineering
>
> We refer to the above letter of guarantee in the sum of S$5,342,828 executed by yourselves in respect of works undertaken by M/s Wallace-Brightside Engineering ('WBE') pursuant to the provisions of the subcontract referred to therein. On 29 October 1987, the validity of the letter of guarantee was extended to 26 February 1988.
>
> *We believe that WBE has failed to fulfil at least one of the conditions of the subcontract* and, we hereby demand payment of the sum of S$5,342,828 pursuant to the terms of the letter of guarantee. Please effect forthwith payment of the sum of S$5,342,828 in accordance with the terms of the letter of guarantee to the Korea Exchange Bank, Singapore Branch, account no 00642 in favour of Hyundai Engineering & Construction Co Ltd. (Emphasis added).

Counsel for the first plaintiffs contends that the terms of the performance guarantee require the second defendants to make a determination that there is a breach of the conditions of the subcontract before they can make a demand, and that their demand notice fails to satisfy such requirement as it makes no determination but merely expresses a belief that a breach has occurred. It is contended that a belief is not a determination. In support of this contention that the terms of the performance guarantee, as a matter of construction, require the second defendants to make a determination, counsel refers to the following authorities: *Esal (Commodities) Ltd* v *Oriental Credit*;[2] *Selvas Pty Ltd* v *Hansen & Yuncken (SA) Pty Ltd* 1987 (unreported);[3] *Pearson Bridge (NSW) Pty Ltd* v *The State Rail Authority of NSW*.[4] I need only consider *Esal's* case, it being the most relevant.

In *Esal's* case,[2] the relevant part of the performance bond issued by the bank reads:

> We undertake to pay the said amount on your written demand *in the event that the supplier fails to execute* the contract in perfect performance ... (emphasis added)

The beneficiary made a demand by telexing the bank 'to immediately seize the amount of the said guarantee'. The Court of Appeal held that the terms of the bond required the beneficiary to inform the bank of the basis provided for in the bond itself and that the demand in question failed to comply with that requirement. Ackner LJ (with whose judgment Glidewell LJ agreed) said (at p 550):

> I accept [the] submission that in addition to the beneficiary making the demand, he must also inform the bank that he does so on the basis provided for in the performance bond itself. This interpretation not only gives meaning and effect

to the words 'in the event that the supplier fails ...' which otherwise would be mere surplusage, but it in no way imposes an extravagant demand upon the bank. A beneficiary may seek, honestly or dishonestly, to apply a performance bond to the wrong contract, and the need to inform the bank of the true basis upon which he is making his demand may be very salutary. Moreover, the desire for an extension of the performance bond may, on occasions, be due to the fact that the performance, for one reason or another, might have been justifiably delayed and the beneficiary does not yet know whether or not there will in due course be full compliance with the contract. The requirement that he must, when making his demand for payment in order to support his request for an extension, also commit himself to claiming that the contract has not been complied with, may prevent some of the many abuses of the performance bond procedure that undoubtedly occur. (See the observation of Mr Justice Kerr (as he then was) in *RD Harbottle (Mercantile) Ltd* v *National Westminster Bank Ltd* [1978] QB 146 at p 150.)

For the reasons given by Ackner LJ, I think it is strongly arguable that on a strict interpretation of the terms of the performance guarantee in the instant case, require the second defendants to make a determination. The autonomous nature of such a type of guarantee, which is a frequent source of unfair calls by unprincipled beneficiaries, demands that the court should require strict compliance with its terms. The decision of the Court of Appeal in *Esal's* case[2] is, in my view, only an application of the established principle in documentary credits that all conditions must be strictly complied with. This approach does not detract from the other established principles that the beneficiary under an unconditional performance guarantee is entitled to payment on demand without having to prove a breach of the underlying contract by the customer. But he must satisfy the court that the demand complies strictly with the requirements of the guarantee.

In the present case, it is arguable that the words 'as determined by you in your absolute judgment' in the performance guarantee require the second defendants to make a determination before it can make a demand. Have they done so by merely stating that 'We believe WBE has failed ...'? There may be more than a semantic difference between saying: 'We have determined that WBE has failed ...' or 'As WBE has failed ...' (which in itself is a determination) and 'We believe that WBE has failed ...'. Counsel for the second defendants contends that belief is a stronger concept than a determination as a belief is 'a conviction of the truth of a proposition, existing subjectively in the mind induced by argument, persuasion or proof addressed to the judgment' (*Black's Law Dictionary*, 4th Ed). One meaning of belief is certainly a conviction of the truth of a proposition, however arrived at. Another meaning of belief is opinion as in the expression 'to the best of my belief'. In my view however, this argument is irrelevant because a determination is not a lower progression of belief or vice versa. The two words are conceptually different and they perform different functions. The word 'belief' expresses a state of mind (in this case that something is the case which does not necessarily lead the believer to act on it) whereas the word 'determination' expresses a conscious act of deciding that something is the case. A belief, however strong it may be, is not a determination in this sense, nor can the communication of that belief amount to a determination in the same sense. It is therefore arguable that since the second defendants did not in their demand notice indicate that they had made a determination but merely a belief, the demand notice did not comply with the requirements of the performance guarantee.

Accordingly, I am of the view that the first plaintiffs have raised an arguable issue on the validity of the second defendants' demand notice, but for the reasons I have given, they are not entitled to a continuation of the ex parte interlocutory injunction obtained against the first defendants or to a fresh injunction against the second defendants. The two applications are dismissed with costs.

Applications dismissed.

Solicitors: *Wee Swee Teow & Co*; *Rodyk & Davidson*; *Arthur Loke & Partners*.

Reported by *Terence Tan Bian Chye*

United Overseas Finance Ltd v Mutu Jeras

HIGH COURT (SINGAPORE) – ORIGINATING SUMMONS NO 287 OF 1988
CHAN SEK KEONG J
20 APRIL 1989

Land Law – Torrens system – Certificate of title not available – Equitable mortgage of land through deed of assignment – Caveat by mortgagee of land – Caveat expiry – Extension of caveat – Sale of land by mortgagor – Caveat by purchaser – Default by mortgagor – Priority between two caveats – Right of mortgagee to remove purchaser's caveat

Statutory Interpretation – Land Titles Act – Reference to book written by draftsman of statute – Reference to academic writers' opinions

The plaintiffs were equitable mortgagees by virtue of a deed of assignment made between them as assignee and the original purchaser of two office units ('the units') as assignor. The plaintiffs lodged a caveat on 21 March 1983 against the units. By the deed of assignment, the original purchaser assigned all her rights and interest in the units comprised in two agreements for sale between the registered proprietor as vendor and herself as purchaser. By an agreement for sale and purchase, the original purchaser agreed to sell the units to the defendant. On 8 December 1983, the defendant lodged a caveat against the units. The caveatee named in the caveat was the original pur-